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Attorneys for Plaintiff and Counter-defendant Epic Games, Inc.

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
OAKLAND DIVISION

EPIC GAMES, INC.,)	Case No. 4:20-cv-05640-YGR-TSH
)	
Plaintiff, Counter-defendant,)	EPIC GAMES, INC.’S BRIEF
)	REGARDING APPLE INC.’S RULE 802
v.)	OBJECTIONS TO THIRD PARTY
)	STATEMENTS TO APPLE
APPLE INC.,)	
)	
Defendant, Counterclaimant.)	
)	
)	

1 During the May 6, 2021 Trial Day, the Court reserved decision on whether to
2 admit three trial exhibits (PX-65, PX-67, PX-744) over hearsay objections made by Apple.
3 These exhibits, and other exhibits that have been or may be introduced at trial, contain users' and
4 developers' descriptions of their dissatisfaction with the App Store and Apple's IAP payment
5 system, in this case relating to fraudulent apps and purchases, developer service delays and
6 customer support issues.

7 Epic respectfully submits that the statements should be admitted because they are
8 not being offered for a hearsay purpose—that is “for the truth of the matter asserted”. Fed. R.
9 Evid. 801(c)(2) (defining hearsay as only including such statements). Rather, these exhibits are
10 offered to prove Apple's awareness of problems in and dissatisfaction with its App Store and its
11 IAP payment system, as described by the consumers and developers who use those products.

12 The third parties' statements are also not hearsay under Federal Rule of Evidence
13 803(3), which exempts from the rule against hearsay “[a] statement of the declarant's then-
14 existing state of mind (such as motive, intent, or plan)”. Under Rule 803, such statements are not
15 hearsay “regardless of whether the declarant is available as a witness”; that is, even if the third
16 parties who made the statements are not testifying at trial. In an antitrust case, this exception
17 embraces what courts have called “customer motive” evidence: out-of-court statements
18 concerning the effect of a monopolist's conduct on customers in the relevant markets. *See*
19 *Complete Ent. Res. LLC v. Live Nation Ent., Inc.*, 2017 WL 6512223, at *4 n. 9 (C.D. Cal. Oct.
20 16, 2017) (citing *Callahan v. A.E.V., Inc.*, 182 F.3d 237, 250-53 (3d Cir. 1999)); *Consol. Credit*
21 *Agency v. Equifax, Inc.*, 2005 WL 6218038, at *2 (C.D. Cal. Jan. 26, 2005) (citing *Hydrolevel*
22 *Corp. v. Am. Soc. of Mech. Engineers, Inc.*, 635 F.2d 118 (2d Cir. 1980), *aff'd*, 456 U.S. 556
23 (1982)).

24 The typical “customer motive” case involves an antitrust plaintiff who proffers its
25 own customers' or potential customers' statements that they cannot do business with the
26 defendant because of the defendant's alleged conduct. Such statements are admissible to
27 demonstrate that customers were motivated to cease business with the plaintiff because of the

1 defendant's conduct and not for some other reason; that is to show exclusionary and anti-
2 competitive effect. *Complete Ent. Res. LLC*, 2017 WL 6512223, at *4 n. 9 (“[R]ecitation of
3 customer statements [regarding their reasons for not using Plaintiffs’ services] falls within the
4 Rule 803(3) exception for statements of motive, as has been recognized by numerous courts”);
5 *Consol. Credit Agency*, 2005 WL 6218038, at *2 (“Courts have held that statements from
6 customers regarding their reasons for not dealing with a supplier are admissible for the limited
7 purpose of proving customer motive.”). In this case, the statements are similarly being offered to
8 show that users and developers do not use Apple’s app distribution and IAP products because of
9 their quality, as Apple asserts, but rather in spite of them. This directly undercuts Apple’s
10 proposed findings, including, for example, that: “The App Store . . . has been a tremendous boon
11 for both consumers and developers” or “Part of the consumer experience that Apple provides is
12 its protection of consumer safety, security, privacy, and reliability, and consumers choose Apple
13 because of its commitment to protecting consumers’ safety, security, privacy, and reliability”
14 (ECF No. 410 at ¶¶ 305, 524.)

15 During the pre-trial process, Apple submitted hearsay objections to testimony that
16 Eric Gray, Apple’s Director of Commerce and Payments, had personally “heard developers
17 expressing dissatisfaction with [Apple’s] processes for providing refunds to customers”. Gray
18 Dep. Tr. 128:8-13, 128:15-25. Retired Magistrate Judge Laporte overruled Apple’s objection,
19 finding that under the precedent cited above, the testimony was admissible “both for [the]
20 witness’s awareness of complaints by developers, i.e., his state of mind, and also as evidence of
21 the impact of allegedly anti-competitive conduct”. (Deposition Objections Chart and Rulings
22 Thereon at pp. 24-25.)

23 Epic respectfully requests that the Court admit these exhibits into evidence and
24 use them for the non-hearsay purposes Epic has identified.

1 Dated: May 7, 2021

2
3 Respectfully submitted,

4 By: Katherine B. Forrest

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